Supreme Court, U.S.
FILED
No. 96-1603 DEC 30 1996
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

Richard L. Cornforth,

Petitioner,

vs.

Donald L. Howard,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard L. Cornforth
A Proper Party
7017 N. W. 28th Street
Bethany, Oklahoma 73008
(405) 789-6148

39 pp

QUESTIONS PRESENTED

I. Whether federal law provides Remedy for damages where state judge threatens, then inflicts award of fees, as punishment for asserting federally protected rights, where state superior court determined judge lacked jurisdiction so to do?

II. Whether arguments of counsel in briefs are testimony, fact or evidence before Federal district Court, or Federal Circuit Court?

III. Whether lower courts deprived Plaintiff / Appellant / Petitioner full and fair opportunity for presentment of proof in support of verified Plaintiff's Affidavits?

IV. Whether judicial immunity exists in a character, nature, mode, venue and jurisdiction done "out of court"?

V. Whether judicial immunity exists when not asserted by proper party by testimony, evidence, fact, or affidavit?

LIST OF PARTIES

The names of all proper parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case.

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Appendix F - October 15, 1996 Ruling. 19a

Petitioner, Richard L. Cornforth, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The October 4, 1996 opinion of the Tenth Circuit Court of Appeals affirming The United States District Court for The Western Judicial District's May 17, 1996 summary judgment for Donald L. Howard.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 4, 1996. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of statutes relied on by Richard L. Cornforth are set forth below:

Oklahoma Statute title 12, § 2012A Defenses and objections---When and how presented---By pleading or motion

A. WHEN PRESENTED. A defendant shall serve his answer within twenty (20) days after the service of the summons and petition upon him, except as otherwise provided by the law of this state. Within twenty (20) days after the service of the summons and petition upon him, a defendant may file an appearance which shall extend the time to respond twenty (20) days from the last date for answering. The filing of such an appearance waives defenses of paragraphs 2,3,4,5,6, and 9 of subsection B of this section . . . .

B. HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

6. Failure to state a claim upon which relief can be granted;

9. Lack of capacity of a party to be sued . . . .

Oklahoma Statute title 21, § 584 Prosecuting or bringing action or procuring arrest in false name-

Every person who maliciously institutes or prosecutes any action or legal proceeding; or makes or procures any arrest, in the name of a person who does not exist, or has not consented that it be instituted or made, is guilty of a misdemeanor.

Oklahoma Statute title 74, § 20f. A.F. State officer or employee-Legal defense services -

A. In the event an action is brought against an employee, who for the purposes of this act shall be an elected or appointed state officer or employee of any state officer, institution, agency, board or commission of any branch of state government in any civil action or special proceeding in the courts of this state, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is the duty of the Attorney General or staff attorney of such person's agency where the agency is authorized by law to be represented in court by a member of its own permanent legal staff, when requested in writing by such employee, to appear and defend the action or proceeding in his behalf. Such written request shall be made within fifteen (15) days after service of summons on the employee and a copy of the request shall be transmitted by the employee to the head of his agency and the Attorney General.

F. Any officer or employee who acts outside of the scope of his official authority shall be liable in damages in the same manner as any private citizen.

42 U.S.C. § 1983 -

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State .... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

Federal Rules of Civil Procedure 12, XIII -

Lack of capacity to be sued .... Absolute judicial immunity

Federal Rules of Civil Procedure 12 (b) -

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, ... the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rules of Civil Procedure 56 (e) Form of Affidavits; Further Testimony; Defense Required. -

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, ... Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto ... When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon

the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Local Rule, Okla., W. District 7.1(h) -

Factual Matters Not Part of the Record. Factual statements or documents appearing only in briefs shall not be deemed to be a part of the record in the case, unless specifically permitted by the Court.

STATEMENT OF THE CASE

Richard L. Cornforth is the subject of litigation Donald L. Howard in part ministered over. Mr. Howard disqualified himself from the cause May 31, 1995. The matter is not at rest. Questions now being investigated include perjury, fraud, forgery, altering a public document, assault, false swearing, mail fraud, bank fraud, and conspiracy.

Mr. Cornforth alleges Mr. Howard used collusion, coercion, intimidation, and threat to interfere with Mr. Cornforth's rights by threatening to use award of attorney fees punitively if Mr. Cornforth appealed Mr. Howard's decisions. Mr. Howard, February 11, 1994 ordered Mr. Cornforth to pay fees The Supreme Court of Oklahoma through its appellate division four ruled and determined February 28, 1995 Mr. Howard had no authority to award describing Mr. Howard's action a "jurisdictional failing." See app. B, page 3, lines 11-17, page 4, line 2.

Records existing show Mr. Howard did not have jurisdiction over the underlying case. Want of sufficient pleadings rendered Mr. Howard without authority to consider fees in the underlying cause. See App. A. Plaintiff in "underlying case" did not submit verified affidavit or state statutory or common law authority as theory of recovery. Oklahoma district court judge acquires subject matter jurisdiction only by sufficient pleadings. See *Buis v. State* 792 P.2d 427-all (Okl.Cr. 1990). See also, App. A. This Court should note both name and address of defendant in App. A are fictitious. On record Mr. Cornforth objected to use of fictitious name and opposing counsel acknowledged erroneous name. The address error was corrected some three years later after complaint to Oklahoma Bar Association. In spite of repeated challenges the use of the false name, a crime under Oklahoma law, continues. See Okla. Stat. tit. 21, § 584.

Mr. Cornforth February 1, 1996 brought paid complaint against Mr. Howard, an individual, under authority of 42 U.S.C.

§ 1983 alleging standing, ripeness, actual damages, and that it was likely injuries should be redressed by remedies sought.

Mr. Cornforth alleged Mr. Howard acted under "color" to deprive Mr. Cornforth of federally protected rights. Mr. Cornforth demanded trial by jury. Mr. Howard received notice via summons February 8, 1996. Mr. Howard joined the controversy by Oklahoma intervening on behalf of Mr. Howard and moving for an extension of time to answer. See Okla. Stat. tit. 12, § 2012 A. March 4, 1996, Mr. Cornforth objected to Oklahoma's intervention by moving to strike Oklahoma's entry of appearance. Mr. Cornforth's Motion to Strike was denied by the District Court although no fact was entered into the record to establish Mr. Howard followed procedure for the state's intervention. Mr. Howard did not answer Mr. Cornforth's complaint. Mr. Howard gave no testimony. Mr. Howard filed no affidavit with the court. Mr. Howard placed nothing before the court to form a basis for the District Court's May 17, 1996 determination.

The Federal District Court, Ralph G. Thompson, granted summary judgment for Mr. Howard. Mr. Thompson's May 17, 1996 ruling was based on the unverified, unsubstantiated statements of non-party Oklahoma's counsel. See app. D.

Mr. Cornforth filed paid appeal with the Tenth Circuit Court of Appeals June 24, 1996. Mr. Cornforth raised four points of law supported by two procedural rules and ten authorities. Neither Mr. Howard nor non-party Oklahoma answered any of Mr. Cornforth's points of law. Authorities cited by Mr. Cornforth were not controverted. Mr. Cornforth proceeded according to rule Eleven of The Federal Rules of Civil Procedure to challenge the veracity of allegations in Oklahoma's comments. The Tenth Circuit sustained Mr. Thompson's summary judgment for Mr. Howard. The Tenth Circuit Court's October 4, 1996 ruling commented on no point of law, procedural irregularity, or authority cited by Mr. Cornforth. Mr. Cornforth's rule eleven Motion to Sanction was denied, apparently by Tenth Circuit Deputy Clerk Opal A. Carter (See App. F).

REASONS FOR GRANTING THE WRIT

I.

The Tenth Circuit Court of Appeals rendered decisions on important matters in conflict with the decisions of other United States courts of appeals on the same matter, and in conflict with decisions of the United States Supreme Court:

1. Public officials who are not elected, have no authority to make policy decisions, and are not imbued with great discretion or responsibility can not correctly assert the affirmative defense of absolute immunity, *Burkhart et al. v. Saxbe et al.*, 397 F. Supp. 409, 502 (1975).[1]

2. Regardless of whether defense of lack of capacity to be sued is based on qualified or absolute immunity, respondent must plead with particularity and prove authority for act, *Green v. James, C.A. Hawaii*, 1973, 473 F.2d 660, *Latino Political Action Com. v. City of Boston*, 581 F.Supp. 478, 481 (1984), and *Fitzpatrick v. Meyer*, 809 F. Supp. 1299, 1305 (S.D. Ohio 1992). F.R.Civ. Proc. Rule 12, XIII.

3. Party complaining under 42 U.S.C. 1983 states a claim upon which relief can be granted if party avers depravation of federally protected rights occurred under "color," *Gomez v. Toledo*, 446 U.S. 635, 640 (1979).

4. Defense of judicial immunity is not of record and before the court where mentioned in brief but not in motion, *Washington v. Official Court Stenographer*, D.C. Pa. 1966, 251 F. Supp. 945.

5. Any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been "waived," *Phillips v. Baker*, C.A. Cal. 1941, 121 F.2d 752, certiorari denied 62 S. Ct. 301, 314 U.S. 688, 86 L.Ed. 551.

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[1]Oklahoma district court judges have jurisdiction only when pleadings are sufficient to invoke authority, Okla. Const. Art 7 § 7. *Buis v. State*, 792 P.2d 427 (Okl.Cr. 1990).

6. Official who presumes the jurisdiction of an other court can not properly assert defense of "mere excess," *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11th Cir. 1984).

7. Statements of counsel in their briefs or arguments are not sufficient for purposes of granting a motion to dismiss or for summary judgment, *Trinsey v. Pagliaro*, D.C. Pa. 1964, 229 F. Supp. 647., Local Rule, Okla., W. District 7.1 (h).

8. Party not submitting affidavit in support of Motion for Summary Judgment can not prevail unless a number of conditions have been met including completion of discovery, adequate time for discovery, notice by the court to opposing party to come forward with all evidence including depositions and answers to interrogatories, averment by moving party failure to produce evidence in support of allegations, and movant must meet burden of proof of the absence of any genuine issues of material fact, *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986).

9. Emotional damage is a triable issue of fact in 42 U.S.C. § 1983 action against official who presumes jurisdiction, *Dykes v. Hosemann*, 743 F.2d 1488, 1500 (11th Cir. 1984).

10. Federal District courts and Circuit courts have no authority to modify a state court's decision, 28 USC § 1257. *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986).

II. The Tenth Circuit Court's sanction of the district court's departure from accepted and usual course of judicial proceedings and the rules of procedure calls for an exercise of the Supreme Court's power of supervision. The proceedings in the court's below offended rules of procedure including:

1. Okla. Stat. tit. 12, § 2012 A.
2. Okla. Stat. tit. 74, § 20f, A.,F.
3. F.R.Civ.Proc. Rule 12, XIII
4. F.R.Civ.Proc. 28 U.S.C. § 1257
5. F.R.Civ.Proc. Rule 12 (b)(6), 56(e), 28 U.S.C.A.
6. Local Rule, Okla., W. District 7.1(h).

III. This Court should determine whether state which was not named or joined in a controversy can intervene without becoming liable.

I.

Federal law provides Remedy for damages where state judge threatens, then inflicts award of fees, as punishment for asserting federally protected rights, where state superior court determined judge lacked jurisdiction so to do.

The record shows Mr. Donald L. Howard wielded powers of intimidation, collusion, and coercion by threats high fees would be imposed should Richard L. Cornforth assert right of appeal.

The underlying case arose without statement of cause of action or theory of recovery to invoke Mr. Howard's subject matter jurisdiction.

Mr. Howard, February 11, 1994 ordered Richard L. Cornforth to pay private attorney fees. Private attorneys April 6, 1994 and October 5, 1994 betrayed collusion with Mr. Howard to continue to escalate the fees. The Oklahoma Supreme Court through its appellate division four, February 28, 1995 ruled and determined Mr. Howard had no authority to order Mr. Cornforth to pay fees and costs associated with past appellate court decision. The Oklahoma Supreme Court through its appellate division four clearly stated Mr. Howard had no authority to award certain fees and costs, described Mr. Howard's action as a "jurisdictional failing," and cited clearly balanced law in support of their opinion. Appendix B, page 1, lines 11-17, page 2 line 2.

Proper inquiry in determining whether defendant judge is immune from suit is whether at time he took challenged action he had jurisdiction over subject matter before him, *Snead v. Kirkland,* D.C.Pa. 1978, 462 F.Supp. 914. In the present case, the Oklahoma Supreme Court through its appellate division four ruled and determined Mr. Howard did not have subject matter jurisdiction for the action challenged by Mr. Cornforth.

Proper inquiry in determining whether defendant judge is immune from suit is whether at time he took challenged action he had jurisdiction over subject matter before him, *Snead v. Kirkland*, D.C.Pa. 1978, 462 F.Supp. 914. In the present case, the Oklahoma Supreme Court through its appellate division four ruled and determined Mr. Howard did not have subject matter jurisdiction for the action challenged by Mr. Cornforth.

Mr. Cornforth brought complaint under 42 U.S.C. 1983, February 1, 1996 stating *inter alia* standing, actual damages, ripeness, that no event made the matter moot, and that Mr. Howard acting under "color of local custom" had presumed jurisdiction acting to damage Mr. Cornforth financially, emotionally, and socially by subjecting Mr. Cornforth to arbitrary adjudication in breach of enumerated and un-enumerated federally protected rights of due process and equal protection of the laws.

Party in "title 42" complaint states a claim upon which relief can be granted if complaint avers depravation of federally protected rights arising from action under color, *Gomez v. Toledo*, 446 U. S. 635, 640 (1979). Party pleads triable issue of fact in "title 42" action if party pleads emotional damages caused by official who has presumed another's jurisdiction, *Dykes v. Hosemann*, 743 F.2d 1488, 1500 (11th Cir. 1984).

Mr. Cornforth presumes by Mr. Howard's position Mr. Howard is highly intelligent, well educated, and specifically trained in law and procedure and therefore acted intentionally and not in error or excess. Claim of "mere excess" is vitiated where official presumes the jurisdiction of another as the Oklahoma Supreme Court determined Mr. Howard did, (App. B, page 1, lines 11-17, page 2 line 2.). *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (11th Cir. 1984). Emotional damage is a triable issue of fact in 42 U.S.C. § 1983 action against official who presumes jurisdiction, *Dykes v. Hosemann*, 743 F.2d 1488, 1500 (11th Cir. 1984).

II.

Arguments of counsel in briefs are not testimony, fact or evidence before Federal district Court, or Federal Circuit Court.

The record shows:

1. Mr. Cornforth's Affidavits are the only fact, evidence or testimony existing before the district court or the circuit court.

2. Mr. Cornforth, February 1, 1996, filed complaint under authority of 42 U.S.C. 1983 naming Mr. Howard as an individual. Mr. Howard received notice and opportunity February 8, 1996 via summons.

3. February 28, 1996, Mr. Howard joined Mr. Cornforth's complaint by moving the district court for extension of time to answer and thereby waiving the affirmative defense of lack of capacity to be sued.

4. Mr. Howard did not answer Mr. Cornforth's complaint.

5. Mr. Howard made no statement, by affidavit or otherwise, he acted as judge in a judicial setting under the Constitution and Law of Oklahoma, or the Constitution and Laws of the United States.

6. Mr. Howard presents nothing before the district court, or the circuit court of appeals substantiating protection under the doctrine of judicial immunity.

The state of Oklahoma was not named, summoned, or joined in the cause. Nothing appears on record to show Oklahoma followed particular requirements for intervention in the cause. See Oklahoma State statute title 74, § 20f A. and F.

The district court and the circuit court based their decisions on opinions and conclusions lacking verification or substantiation by non-party Oklahoma's attorney.

Statements of counsel in brief or argument are not sufficient for motion to dismiss or for summary judgment, *Trinsey v. Pagliaro*, D. C. Pa. 1964, 229 F. Supp. 647, F.R.Civ. Proc., Rule 12 (b) (6), 56(e), 28 U.S.C.A.

III.

Lower courts deprived Plaintiff / Appellant / Petitioner full and fair opportunity for presentment of proof in support of verified Plaintiff's Affidavits.

The record reflects only Mr. Cornforth placed facts before the district court and the circuit court for their determinations.

The district court and the circuit court relied on unverified, unsubstantiated opinions and conclusions of non-party Oklahoma's attorney for their determinations.

Party who has not filed affidavit in support of motion for summary judgment can not prevail unless a number of conditions are true including completion of discovery, adequate time for discovery, notice by the court to the opposing party to come forward with all evidence, and proof no issue of material facts exists, *Celotex Corp. v. Catrett*, 477 U. S. 317 (1986).

IV.

Judicial immunity does not exist in a character, nature, mode, venue and jurisdiction done "out of court."

Oklahoma Const. Art. 7 § 7 has been determined to mean that a district court's jurisdiction can only be exercised through filing of pleadings which are sufficient to invoke the power of the court to act. See *Buis v. State* Id. *supra* page 3, paragraph 3.

Mr. Cornforth asserts Mr. Howard's judgment in the underlying cause was void on its face for want of subject matter jurisdiction based upon the standard for review at *Buis v. State*.

When a suit is brought and determined in a court which has no jurisdiction in the matter, then it is said to be *coram non judice*, "In the presence of a person not a judge. " BLD, 5th Ed. Page 305.

V.

Judicial immunity does not exist when not asserted by proper party by testimony, evidence, fact, or affidavit.

As stated *supra* Mr. Howard presented nothing before the district court, or the circuit court of appeals substantiating protection under the doctrine of judicial immunity.

Public officials who are not elected, have no authority to make policy decisions, and are not imbued with great discretion or responsibility can not correctly assert the affirmative defense of absolute immunity, *Burkhart et al. v. Saxbe et al.*, 397 F. Supp. 409, 502 (1975).

Regardless of whether defense of lack of capacity to be sued is based on qualified or absolute immunity, respondent must plead with particularity and prove authority for act, *Green v. James, C.A. Hawaii*, 1973, 473 F.2d 660, *Latino Political Action Com. v. City of Boston*, 581 F.Supp. 478, 481 (1984), and *Fitzpatrick v. Meyer*, 809 F. Supp. 1299, 1305 (S.D. Ohio 1992). F.R.Civ. Proc. Rule 12, XIII.

Defense of judicial immunity is not of record and before the court where mentioned in brief but not in motion, *Washington v. Official Court Stenographer*, D.C. Pa. 1966, 251 F. Supp. 945.

Any defense permitted to be made by motion at option of defendant, and which is not raised either by motion or by answer, will be deemed to have been "waived," *Phillips v. Baker*, C.A. Cal. 1941, 121 F.2d 752, certiorari denied 62 S. Ct. 301, 314 U.S. 688, 86 L.Ed. 551.

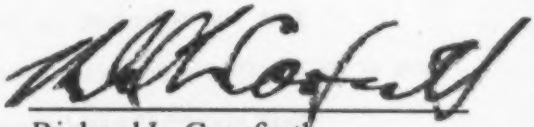
CONCLUSION

Determination by this Court, the courts below so departed from the rules of procedure and the *stare decisis* controlling the subject matter of Mr. Cornforth's complaint and appeal as to deprive Mr. Cornforth of his federally protected right to his "day in court" justly requires reversal of the summary judgment for Mr. Howard and remand to the District Court with instruction to go forward with a jury's determination of damages.

Determination by this Court, the state of Oklahoma can not intervene in a cause without becoming liable, justly requires instruction to the District Court.

Reticence by this Court to grant this writ should serve to stay consideration of this Petition For A Writ Of Certiorari until completion of investigations.

The above and foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States was prepared and submitted by:



Richard L. Cornforth
A Proper Party
7017 N. W. 28th Street
Bethany, Oklahoma 73008
(405) 789-6148

APPENDIX A - AFFIDAVIT FILED IN THE UNDERLYING CAUSE FILED APRIL 27, 1992

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

WESTLAKE PRESBYTERIAN CHURCH, INC.
an Oklahoma Corporation,
Plaintiff

2801 N. Rockwell
Oklahoma City, OK 73008
Address

(405) 787-3616
Phone

Small Claims No. SC-
SC 92 6910

vs.

RICHARD CORNFORTH, SR.
Defendant.

AFFIDAVIT

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Regena K. McNeill, attorney for Plaintiff, being duly sworn, deposes and says:

That the Defendant resides at 7017 N.W. 28th, Oklahoma City, Oklahoma in the above-named County, and that the mailing address of the Defendant is the same.

That the Defendant is indebted to the Plaintiff in the sum of $2,500.00 for property damages sustained on June 26, 1990.

That Plaintiff has demanded payment of said sum, but the Defendant has refused to pay the same and no part of the amount sued for has been paid.

Appendix A

DURBIN, LARIMORE & BIALICK

By: Regena K. McNeill

Regena K. McNeill, OBA #13584
920 N. Harvey
Oklahoma City, OK 73102-2610
Telephone: 405/235-9584
Attorney for Plaintiff

Subscribed and sworn to before me this 7th day of April, 1992.

Barbara Ellis
Notary Public

My Commission Expires:

8-17-94

APPENDIX B - ORDER AND JUDGMENT OF THE OKLAHOMA SUPREME COURT, APPELLATE DIVISION 4 REGARDING THE UNDERLYING CASE, FILED FEBRUARY 28, 1995

Recd (date) 2-28-95
Posted M
Mailed M
Distrib M
Publ 265 60

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
FEB 28 1995
JAMES W. PATTERSON
CLERK

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

WESTLAKE PRESBYTERIAN CHURCH, INC., an Oklahoma corporation, Appellee,	)	
vs.	)	No. 83,228
RICHARD L. CORNFORTH, SR., Appellant.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable Donald L. Howard, Trial Judge

Regena K. McNeill
Elizabeth J. Sloan
Durbin, Larimore & Bialick
Oklahoma City, Oklahoma — For Appellee

Richard L. Cornforth
Oklahoma City, Oklahoma — Pro Se Appellant

MEMORANDUN OPINION

STUBBLEFIELD, J.

This is an appeal from an order of the trial court awarding attorney fees in an action brought against a parent for damage to property caused by a minor child. Based upon our review of the record on appeal and applicable law, we affirm as modified.

Appendix B

This action was originally initiated by Westlake Presbyterian Church (Church) against Defendant Richard L. Cornforth. Church sought recovery against Cornforth, by authority of 23 O.S.1991 § 10, for damage to the church and church property caused by the vandalism of Cornforth's minor child. Church put on evidence of damage exceeding $15,000 but pursued only the $2,500 amount allowed by section 10.

The trial court granted judgment for $2,500 and also granted judgment for attorney fees, although specifying in the journal entry of judgment that the amount was "(to be determined upon Application of Plaintiff)." Thus, the judgment clearly awarded attorney fees but left the amount pending. However, Cornforth appealed the judgment complaining of the $2,500 award against him.

Approximately one month after the initiation of that appeal, Church filed an application in the lower court to fix the specific amount of attorney fees. However, because the attorney fee dispute was not listed in the petition in error as a pending post-trial motion, the appeal, dealing only with the $2,500 judgment, was considered and affirmed by a division of this court. Then, upon affirmance and remand, Church pursued the attorney fee question, amending its pending application to seek additional costs and fees <u>expended on appeal</u>. The trial court granted judgment for fees incurred in the original proceedings <u>and for defense of the appeal</u>. Cornforth appeals.

Appendix B

Cornforth raises two propositions of error. He first claims that there was no statutory authority for the award of any attorney fees. However, the action was clearly one to recover for willful injury to property and, therefore, the award of attorney fees to the prevailing party is specifically authorized by 12 O.S.1991 § 940.

Cornforth then raises an issue that does have merit. He claims that the trial court had no authority to award appellate attorney fees where the appellate court had not granted such fees.

Indeed, this is a correct statement of the law. The court in Chamberlin v. Chamberlin, 720 P.2d 721, 727-28 (Okla. 1986), clearly stated: "[The trial court] cannot determine in a post-appeal proceeding a party's liability for appeal-related counsel fees incident to a terminated appeal unless such award has been authorized by an appellate court's pronouncement or by some of its post-decisional orders." (Footnotes omitted)(emphasis in original). Church does not dispute this statement of the law but claims that Cornforth did not raise the issue before the trial court and may not raise it for the first time on appeal.

We have carefully considered Church's argument because of its clear entitlement, if application had been made, to appellate attorney fees in an instance where it was entitled to such fees in the original proceedings. B & P Constr. Co. v. Wells, 759 P.2d 208 (Okla. 1988). However, the trial court's award of appellate fees, without authority of the appellate court, is

apparent upon the face of the record, and as such is a jurisdictional failing that may be raised at any time. Hawthorne v. Hameed, 836 P.2d 683 (Okla. Ct. App. 1989).

Therefore, we must agree that the trial court exceeded its authority. However, the record clearly delineates the various components of the attorney fee award, and based upon that information, we can adjust the award to enter the judgment that the trial court should have entered.

Church's counsel sought what it characterized as fees and costs. However, the costs were actually a component of attorney fees -- postage, copies, and long distance phone charges. Those expenses, which were incurred in the earlier proceedings, were awarded as costs in the earlier judgment, and that award was not appealed.

Based upon our review of the meticulous record regarding attorney charges, we find that Church was not entitled to reimbursement for further "costs" incurred after initiation of the appeal. Nor is Church entitled to an award for post-appeal counsel fees, except for those efforts pursuing the award originally ordered by the trial court. Therefore, we modify the judgment of the trial court to grant judgment in favor of Church and against Cornforth for attorney fees in the amount of $1,350.

The judgment of the lower court as modified is AFFIRMED.

GOODMAN, P.J., and RAPP, V.C.J., concur.

APPENDIX C - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DENYING PLAINTIFF'S MOTION TO STRIKE FILED MARCH 15, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FILED
MAR 15 1996
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT WESTERN DIST. OF OKL.
DEPUTY

RICHARD L. CORNFORTH,)
)
Plaintiff,)
)
vs.) Case No. CIV-96-179-T
)
DONALD L. HOWARD,)
)
Defendant.)

ORDER

Plaintiff, Richard L. Cornforth, has filed a motion to strike, requesting the Court strike the appearance of an Oklahoma assistant attorney general, appearing on behalf of defendant, Donald L. Howard. Defendant has filed a response and the matter is now at issue.

Plaintiff argues that defendant was acting outside his scope of employment when he committed the acts of which plaintiff complains and thus defendant cannot be represented by the attorney general. Defendant argues that plaintiff has no authority for filing the motion to strike. Defendant also argues that plaintiff filed the motion to strike to harass defendant.

Oklahoma law provides for the attorney general to represent a state employee when an action is brought against that employee for any act done in the course of the employee's employment. Okla. Stat. tit. 74, § 20f(A). It appears from plaintiff's complaint that defendant was employed as a state judge at the time he committed the acts in

question. As such, he is entitled to the representation of the attorney general. Plaintiff's motion to strike is DENIED.

IT IS SO ORDERED this 15th day of March, 1996.

RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX D - MAY 17, 1996 ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FILED

MAY 17 1996

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

RICHARD L. CORNFORTH,

Plaintiff,

vs.

DONALD L. HOWARD,

Defendant

Case No. CIV-96-179-T

ORDER

This matter is before the Court for consideration of defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiff, Richard L. Cornforth, has sued for a violation of his civil rights under 42 U.S.C. § 1983. Plaintiff has filed a response to the motion for summary judgment and the matter is now at issue.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts presented to a court in a motion for summary judgment are construed in a light most favorable to the nonmoving party. Burnette v. Dow Chemical Co., 849 F.2d 1269, 1273 (10th Cir. 1988). Although the Court views facts and inferences drawn from the record in a light most favorable to the nonmoving party, "[e]ven under this standard there are cases where the evidence is so

weak that the case does not raise a genuine issue of fact." Id. Summary judgment is appropriate if plaintiff fails to make a sufficient showing of an essential element of his case on which he has the burden of proof. Meredith v. Beech Aircraft Corp., 18 F.3d 890, 893 (10th Cir. 1994).

FACTUAL BACKGROUND

With the preceding standard in mind, the facts concerning plaintiff's claims are as follows. Plaintiff was sued by Westlake Presbyterian Church ("Westlake") for vandalism damage allegedly committed by plaintiff's son. The suit was brought in Oklahoma County District Court and presided over by defendant, a Special Judge for Oklahoma County. Westlake received a judgment against plaintiff for $2,500. Plaintiff appealed that judgment.

After the judgment was affirmed on appeal, Westlake filed an application for attorney fees and costs in Oklahoma County District Court. The application included costs and attorney fees for defending the appeal. Defendant granted the application. Plaintiff appealed the award of costs and fees. The Oklahoma Court of Appeals found that the Oklahoma County District Court did not have the authority to award costs and fees incurred during the appellate process because the order affirming the original judgment had not authorized the court to do so. The Court of Appeals said that defendant exceeded his authority in awarding fees and costs expended for the appeal. The Court of Appeals subtracted the amount of fees and costs incurred during the appellate process and awarded Westlake $1,350 for fees and costs.

Appendix D

Plaintiff is proceeding pro se so the Court must construe his pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Plaintiff asserts that defendant's actions violated plaintiff's due process rights and right to be free from arbitrary adjudication. Defendant asserts that he cannot be held liable under § 1983 because as a judge he has absolute immunity.

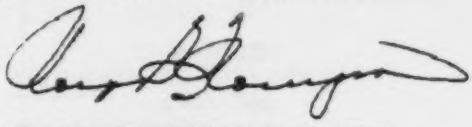
Judges are not liable under § 1983 for their judicial acts, even when those acts are in excess of their jurisdiction. Stump v. Sparkman, 435 U.S. 349, 355-56 (1978), reh'g denied, 436 U.S. 951 (1978). Whether a judge has immunity depends upon whether the judge had jurisdiction of subject matter before him. Id. at 356. The scope of the judge's jurisdiction must be construed broadly. Id. A judge is not deprived of immunity if he acts in error or exceeds his authority; to lose immunity, the judge must act in the clear absence of jurisdiction. Id. at 356-57.

Clearly, defendant's actions in awarding attorney fees and costs incurred during the appeal were in error. In its opinion, the Oklahoma Court of Appeals cited a case, Chamberlin v. Chamberlin, 720 P.2d 721 (Okla. 1986), that held a trial court "cannot determine in a post-appeal proceeding a party's liability for appeal-related counsel fees incident to a terminated appeal unless such an award has been authorized by an appellate court's pronouncement or by some post-decisional orders." Id. at 727-28. Although defendant's decision was erroneous, defendant must have acted in the clear absence of jurisdiction to lose his absolute immunity.

Defendant was presiding over small claims court at the time he rendered his decision to award attorney fees and costs. Plaintiff does not dispute that defendant

generally had the jurisdiction and authority to award attorney fees and costs. By awarding fees and costs incurred during an appeal without the authority of the Court of Appeals, defendant exceeded his authority. He did not act in the clear absence of jurisdiction. Therefore, defendant has absolute immunity from suit for the erroneous awarding of fees and costs. Defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED this 17th day of May, 1996.



RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

Appendix D

FILED

MAY 17 1996

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

RICHARD L. CORNFORTH,)
)
Plaintiff,)
)
vs.) Case No. CIV-96-179-T
)
DONALD L. HOWARD,)
)
Defendant.)

JUDGMENT

This matter came on for consideration of the motion for summary judgment filed by defendant Donald L. Howard. For the reasons set forth in the Court's order filed this date, defendant is entitled to judgment in his favor and against plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment enter in favor of defendant and against plaintiff.

DATED this 17th day of May, 1996.

RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON
MAY 17 1996

APPENDIX E - OCTOBER 4, 1996 ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AFFIRMING MAY 17, 1996 SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF OKLAHOMA

FILED
United States Court of Appeals
Tenth Circuit
OCT - 4 1996
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RICHARD L. CORNFORTH,

Plaintiff-Appellant,

v.

DONALD L. HOWARD,

Defendant-Appellee.

No. 96-6206
(D.C. No. CIV-96-179-T)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before TACHA, BALDOCK, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore, the case is ordered submitted without oral argument.

In this 42 U.S.C. § 1983 action, Richard L. Cornforth appeals from the district court's order granting summary judgment in favor of Donald L. Howard, a special judge for Oklahoma County District Court. We affirm.

Cornforth was the defendant in a civil action heard by Judge Howard. Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Howard awarded the plaintiff in that case attorney fees, including fees related to an appeal taken by Cornforth in which the plaintiff prevailed. Cornforth appealed the attorney fee award to the Oklahoma Court of Appeals and the court found Judge Howard had exceeded his authority in including fees related to the prior appeal (Westlake Presbyterian Church v. Cornforth, (No. 83,228, February 28, 1995)). See Chamberlin v. Chamberlin, 720 P.2d 721, 727-28 (Okla. 1986) (trial court cannot award appeal-related fees after appeal unless award is authorized by appellate court). The Oklahoma Court of Appeals modified the attorney fee award and affirmed the judgment as modified.

In the present action, Cornforth maintains Judge Howard's award of appeal-related attorney fees deprived Cornforth of a constitutional right to be free of "arbitrary adjudication." He alleges Judge Howard acted maliciously and in bad faith. In granting Judge Howard's motion for summary judgment, the district court found Judge Howard was entitled to absolute judicial immunity.

Summary judgment will be affirmed on appeal where, taking the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wilson v. Meeks, 52 F.3d 1547, 1551-52 (10th Cir. 1995).

Generally, a judge is immune from a suit for money damages. Immunity can be overcome only where the challenged actions are nonjudicial, or are "taken in the complete absence of all jurisdiction." Mireles v. Waco, 502 U.S. 9, 11 (1991). Cornforth does not argue that Judge Howard's award of attorney fees was a nonjudicial action, but contends Judge Howard lacked jurisdiction to make the award. The question of judicial immunity does not turn on the judge's authority to perform the specific act being challenged, but on

the scope of the judge's jurisdiction in a broad sense. "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (citation omitted).

Judge Howard had jurisdiction over the civil case and over the question of the proper calculation of attorney fees to be awarded. Although he exercised that jurisdiction erroneously and because of the error Cornforth was entitled to have the calculation corrected on appeal, Cornforth was not entitled to claim compensation for damages caused by the error. Nor do Cornforth's allegations regarding Judge Howard's motives remove the protection of judicial immunity. Judicial immunity is an immunity from suit, not just damages. Therefore, allegations of malice, bad faith, or corruption do not overcome a proper claim of immunity. See Mireles, 502 U.S. at 11.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX F - OPAL A. CARTER'S OCTOBER 4, 1996 ORDER DENYING APPELLANT'S MOTION TO SANCTION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD L. CORNFORTH,	)	
	)	
Plaintiff - Appellant,	)	
v.	)	No. 96-6206
	)	CIV-96-179-
DONALD L. HOWARD,	)	
	)	
Defendant - Appellee.	)	

ORDER
Filed October 15, 1996

Before TACHA, BALDOCK and BRISCOE, Circuit Judges.

Appellant's Motion to Sanction is denied.

Entered for the Court

PATRICK FISHER, Clerk

Opal A. Carter

By Opal A. Carter
Deputy Clerk